ranty alone. . . . . Now, the word 'warranty' has a well-defined legal meaning. . . . . Browne, in his work on Fraud, says: 'A warranty differs from a representation in that a warranty must always be given contemporaneously with, and as a part of, the contract; whereas a representation precedes and induces to the contract. And, while that is their difference in nature, their difference in consequence or effect is this: That upon breach of warranty (or false warranty) the contract remains binding, and damages only are recoverable for the breach; whereas, upon a false representation, the defrauded party may elect to avoid the contract, and recover the entire price paid.'

"So construed, an examination of the petition will disclose the alleged fraudulent representations of defendant's agents making the sale of the shares of the plaintiffs are not in any sense warranties or statements of warranty, but are merely statements and representations of material existing facts made by the agents for the purpose of inducing plaintiffs to purchase the shares. . . . "Again, where one party to a trade has been induced to enter into it through the fraud, deceit and misrepresentations of the other party, in material matters, no binding trade results, and the defrauded party does not become bound by its terms. As to him the apparently completed transaction remains as though it had never existed. Such party is bound neither to its provisions nor by the principles of the law applicable to valid transactions of such nature."

The court therefore granted the application for a rehearing in this case, holding that "those paragraphs of defendant's answer to the amended petition relied upon to work an estoppel, or in bar of the further prosecution of this suit, must be, and are, held insufficient for such purpose, and, in so far as relied upon to constitute an estoppel or any bar to the further prosecution of this suit, are dismissed therefrom as contrary to good conscience and fair dealing between man and man."

Hospitals—Liability for Misconduct of Employees.—The decisions of the Supreme Court of Nebraska in Wetzel *v.* Omaha Maternity & General Hospital Ass'n (148 N. W., 582) and Broz *v.* Omaha Maternity & General Hospital Ass'n (148 N. W., 575), both holding that a hospital incorporated and conducted for private gain is liable in damages to patients for the negligence of nurses and other employees. While not novel or inherently significant [administering the rule **respondent superior**] they called for at least passing notice because the same tribunal had recently gone to the full length in exonerating a public charitable hospital from liability for negligence. In Duncan *v.* Nebraska Sanatorium Ben. Ass'n (137 N. W., 1120) it was held that a hospital of the latter class is exempt from liability for negligence for injuries to a patient through negligence of its employees, although the patient pays "full price"

for his board and treatment.

The recent decision of the Supreme Judicial Court of Massachusetts in Vannah *v.* Hart Private Hospital (September, 1917, 117 N. E., 328) follows and even extends the policy of the two Nebraska cases first above cited. It was held that where plaintiff engaged accommodations at a private hospital, also contracting for nursing before, during and after an operation, and one of the operating nurses stole a ring from plaintiff's hand while she was under the influence of ether, there was a violation by the hospital of its duty toward plaintiff under its contract with her for which the hospital corporation would be liable in damages. The court expressly lays down that the act of stealing the ring was not committed within the scope of the nurse's employment, and also that the hospital is not answerable to the patient on the ground of negligence. The decision is put upon the same broad ground upon which common carriers are held liable for insults or abuse to passengers by employees; that is, breach of contract. The Massachusetts court said in part:

"In its legal aspects the case is governed by the decision in Bryant *v.* Rich (106 Mass., 180, 8 Am. Rep., 311). In that case a dispute arose between a passenger on one of the defendant's steamers and one of the defendant's waiters as to whether the passenger had paid for his supper. The plaintiff, a cousin of the passenger in question made a suggestion to which no exception could have been taken. Whereupon not only the waiter in question, but the head steward and the other waiters, knocked down the plaintiff and beat him. It was for this assault and battery that the action in Bryant *v.* Rich was brought. The presiding judge ruled (in accordance with a request made by the defendant) that 'there is no evidence that the steward and waiters, in assaulting the plaintiff, were acting within the scope of any authority, or in the discharge of any duty imposed upon them by the defendants.' But in spite of this he instructed the jury that the plaintiff was entitled to recover. This ruling was sustained on the ground that as a matter of contract the plaintiff as a passenger had the right to receive proper treatment from the defendant, their servants and all of them. * * * The decision in Bryant *v.* Rich does not depend upon the fact that the defendants in that case were common carriers. The decision would have been the same had the assault and battery occurred on an excursion steamer in place of upon a steamer operated by a common carrier. And the decision would have been the same if the steward and waiters had stolen rings from Bryant's fingers in place of knocking him down as they did. The doctrine of Bryant *v.* Rich applies whenever there is a contract between the plaintiff and defendant by force of which the defendant is to furnish for the plaintiff's comfort the service of its, the defendant's employees. Where the injury to the plaintiff is caused by an act of the defendant's servants

done in the course of their employment an action may be brought based on negligence of the defendant's servants for which the defendant is liable because the act took place in the course of his servant's employment, or an action may be brought in that case based on violation of the duty owed by the defendant to the plaintiff under the contract between the defendant and the plaintiff. But where (as was the case in Bryant *v.* Rich and in the case at bar) the injury done the plaintiff is caused by an act of the defendant's servants outside of the servants' duty as employees of the defendant, by an act of the defendant's servants which, while not in the course of the servants' employment, is none the less a violation of the duty owed by the defendant under the defendant's contract with the plaintiff, the only action that can be brought is an action founded upon the duty arising out of the contract."

CORRESPONDENCE.

Signing of Instrument to Constitute Forgery and Regulating Width of Ties Used on Improved Roads.

December 15th, 1917.

Editor Virginia Law Register,
Charlottesville, Va.

Dear Sir:—

I beg to advise you that petitions for writ of error to judgments of the Circuit Court of Wise County rendered in two criminal cases, involving points not heretofore directly decided by the Supreme Court of Appeals and which may be of general interest to the profession, have been refused by the Supreme Court of Appeals at its present session, thus affirming the judgment of the Circuit Court. I write to call your attention to these rulings, so that if you care to do so, you may call same to the attention of the profession through your columns.

One of these cases is that of The Commonwealth *v.* B. D. Combs, indicted for forgery, tried and convicted at the July term, 1917, and sentenced to two years in the penitentiary. This case involved the question of the sufficiency of the signature to a forged instrument. The instrument in question was a promissory note, the signature thereto being as follows: "James X Collins." The signature was apparently intended to be made by a mark, but no mark had been made in the space apparently intended for it. It was contended for the defendant that the signature was incomplete, and that it had no apparent legal efficacy, but the Court held that it could not be said, as a matter of law, that the instrument could by no possibility operate to the prejudice of another's right, and left